HENRY MCMASTER
ATTORNEY GENERAL

May 26, 2010

The Honorable Larry A. Martin
Senator, District No. 2
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Martin:

You seek an opinion regarding the constitutionality of S.1446. Such legislation concerns the detention by South Carolina law enforcement officers of those who are "reasonably assumed by the officer to be in the United States illegally." You note that "the bill also would make it unlawful for a person who is in the United States illegally to solicit a job." Further, you state that "S.1446 is modeled after the Arizona law that recently was enacted," and that it is your understanding "that at least four different lawsuits have been filed against the Arizona bill's enforcement arguing violations of the Supremacy Clause and First Amendment rights." While you further indicate that the legislation will require additional amendments, you request our "review of this bill and [this Office's] ... opinion as to whether S.1446 does violate the Supremacy Clause, the First Amendment or any other legal issue which the subcommittee should consider in any amendments to the bill."

Law / Analysis

We have previously recognized in an earlier opinion of this Office that "[a] number of authorities support the conclusion that the Immigration and Naturalization Act, 8 U.S.C. ch. 12 (INA), does not preempt state and local law enforcement officers from enforcing the criminal provisions of federal immigration law so long as such enforcement is authorized by the law of that particular state." *Op. S.C. Atty. Gen.*, March 26, 2002 (2002 WL 399643). Referencing an Opinion of the New York Attorney General (N.Y.A.G. March 21, 2002), we stated as follows:

> ... Section 1252c of the INA authorizes state and local law enforcement officers, to the extent permitted by state law, to arrest illegal aliens previously convicted of a felony and who have been deported and left the country after conviction. That provision further states that such arrests may be made only after the local official confirms the individual's status with INS (Immigration and Naturalization Service) and only for the time necessary to take the individual into custody. The New York

> Attorney General's opinion also referenced Section 1324(c) which authorizes "all other [law enforcement] officers whose duty it is to enforce criminal laws "to arrest persons for violating subsection (a) of that section, which imposes criminal penalties for transporting and harboring illegal aliens.
>
> The New York Attorney General's opinion noted that while these are the only two provisions of federal immigration law which specifically authorize state and local criminal enforcement, courts have concluded that enforcement of other criminal provisions of the federal immigration laws is not preempted. *See, Gonzalez v. City of Peoria*, 722 F.2d 468, 472-475 (9th Cir. 1983), overruled in part on other grounds, *Hodgers-Durgin v. De la Vina*, 199 F.3d 1037 (9th Cir. 1999) [nothing in federal law preempts state and local enforcement of federal immigration laws' criminal provisions); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 (10th Cir. 1999), *cert. den.* 120 S.Ct. 264 (1999). The New York Attorney General therefore concluded that while civil violations of the federal immigration laws would not constitute a basis for an arrest, "the INA does not preempt the authority of state and local officials to make warrantless arrests for criminal violations of the INA, *insofar as such activity is authorized by state and local laws.*" (emphasis added).

In *Gonzales v. City of Peoria, supra*, the Ninth Circuit Court of Appeals relied upon the United States Supreme Court landmark decision in *De Canas v. Bica*, 424 U.S. 351 (1976). The *Gonzales* Court found that *De Canas* makes clear that state laws dealing with enforcement of federal immigration laws are not necessarily preempted by federal law, and thus it does not follow that such laws are *per se* violative of the Supremacy Clause of the United States Constitution. *Gonzales*, explained that

> [a]lthough the regulation of immigration is unquestionably an exclusive federal power, it is clear that this power does not preempt every state activity affecting aliens. *De Canas*, 424 U.S. at 354-55 .... The plaintiffs' reference to exclusive federal authority over immigration matters thus does not resolve this question. Instead, we must define precisely the challenged state enforcement activity to determine if "the nature of the regulated subject matter permits no other conclusion."

722 F.2d at 474. After examining the legislative history of the federal Immigration and Naturalization Act, the *Gonzales* Court concluded that "federal law does not preclude local enforcement of the criminal provisions of the Act." *Id.* at 475. Other authorities are in accord with this holding in *Gonzales*. *See, Farm Labor Organizing Comm. v. State Highway Patrol*, 991 F. Supp. 895, 903 (N.D. Ohio 1997) ["I agree with the court in *Gonzales* that federal law does not preclude local or state enforcement of the penal provisions of the INA."]; *Fonseca v. Fong*, 167 Cal.

App. 4th 922, 84 Cal.Reptr. 567 (2008) [INA does not indicate a clear and manifest purpose to effect a complete ouster of state power to promulgate laws not in conflict with federal laws pertaining to immigration regulation; thus, state statute requiring an arresting agency to notify the appropriate federal agency when there is reason to believe that any person arrested for an specified drug offense that person may be in United States illegally was not preempted].

Fonseca v. Fong, supra, is particularly instructive with respect to our conclusion herein that federal law does not preempt the State's authority, acting through its law enforcement officers, to enforce the immigration laws enacted by Congress. In *Fonseca*, at issue was a California statute which required notification of federal authorities when state law enforcement officers have reason to believe that a person arrested for a specified drug offense is not a citizen of the United States. The statute was challenged on the ground that it violated the Supremacy Clause of the United States Constitution; the trial court agreed, finding that the provision effectively required the San Francisco Police Department "'to act as an investigative arm of the federal deportation authorities.'" 187 Cal.App.2d at 932.

However, the California appellate court reversed the trial court's decision. The Court emphasized that in *De Canas, supra*, the United States Supreme Court had instructed that a state statute impermissibly invades the exclusive power of the federal government to regulate immigration if it essentially requires state or local officials to make "'a determination of who should or should not be admitted into the country, and [defines] the conditions under which a legal entrant may remain.'" *Id* at 936, quoting 424 U.S. at 355. Applying this constitutional test, the *Fonseca* Court found that the California statute was not preempted, concluding as follows:

> Section 11369 does not require any state or local law enforcement agency to independently determine whether an arrestee is a citizen of the United States, let alone whether he or she is in the United States lawfully or unlawfully. Nor does the statute create or authorize the creation of independent criteria by which to classify individuals based on immigration status .... All of those determinations, as well as the duty to tell an arrestee who may be in this country unlawfully to either obtain legal status or leave, are left entirely to federal immigration authorities ....
>
> Section 11369 "may indirectly or incidentally affect immigration by causing [undocumented aliens] to leave the state or deterring them from entering California in the first place" ... and it may also result in more deportation of persons unlawfully present in this country. But the crucial fact remains that ... Section 11369 does not oblige state or local officials to determine "what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization" (*Takahashi v.*

> *Fish Comm'n* ... [334 U.S. 410, 419 (1948)]) and the statute is therefore not an impermissible state regulation of immigration within the meaning of *De Canas, supra*, 424 U.S. at page 355 ....

Id. at 936-937. *See also, State v. Altamirano*, 2009 WL 838360 (2009, unpublished opinion) [Louisiana statute prohibiting a person from operating a motor vehicle in Louisiana unless lawfully in the United States "is not a constitutionally impermissible regulation or immigration because it does not involve a state determination of who should be admitted into the country or the conditions under which a legal entrant may remain."]; 3 C.J.S. *Aliens* § 289 ["Nothing in federal law precludes state or local police from enforcing the criminal provisions of the INA, and state and local police may arrest persons for violation of these provisions if such arrests are authorized by state law."].

Here, Section 1 of S.1446 is not, in our opinion, preempted by federal immigration law and does not violate the Supremacy Clause of the United States Constitution. Section 1 provides in pertinent part that

> (C) If during the commission of a lawful stop, detention or arrest by a law enforcement officer or agency of this State or political subdivision of this State, where reasonable suspicion exists that a person stopped, detained, or arrested is an alien and unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, unless the determination may hinder or obstruct an investigation. The person's immigration status shall be verified with the federal government pursuant to 8 USC 1373(c).

Our examination of Section 1 in its entirety reveals that the General Assembly does not seek nor intend to "regulate immigration" which is "unquestionably exclusively a federal power." *De Canas*, 424 U.S., *supra* at 354. As in *De Canas*, which involved the upholding of a California statute prohibiting the knowing employment of illegal aliens, S.1446's Section 1 does not attempt to determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355. Indeed, Section 1(A) expressly states that "[n]o official or agency of this State or any political subdivision of this State may limit or restrict the enforcement of federal immigration laws." Subsection (C) requires a reasonable attempt to "determine the immigration status" pursuant to 8 U.S.C. 1373(C) of a person who has been lawfully stopped, detained or arrested. Subsection (B) expressly provides that a person's immigration status may only be determined by officers authorized by federal authorities to do so or by the proper federal, officials. Other provisions of Section 1 defer to federal immigration laws regarding the person's status, and conclude with Section (H) which states that "[t]his law shall be implemented in a manner that is consistent with federal laws regulating immigration, protecting the civil rights of all persons and

respecting the privileges and the immunities of United States citizens." Thus, in our opinion, Section 1 of the Act essentially authorizes state and local police officers to enforce federal immigration laws, consistent with those laws and thus is not preempted by federal law. Accordingly, we do not believe Section 1 violates the Supremacy Clause.[1]

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[1] Nor do we deem Section 2 to be clearly preempted by federal law and thus violative of the Supremacy Clause. Section 2(c) states that it "is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor."

In *De Canas*, the state law prohibited an employer from knowingly employing an alien not entitled to lawful residence in the United States if such employment would have an adverse impact on lawful resident workers. The Court articulated three separate tests to determine whether a state statute relating to immigration is preempted: (1) constitutional preemptions; (2) field preemption; and (3) conflict preemption. Failure of any of these three tests result in preemption, explained the *De Canas* Court.

We acknowledge that at least one case has found that federal immigration law now expressly preempts an ordinance which prohibited the knowing employment and harboring of illegal aliens. In *Lozano v. City of Hazleton*, 496 F.Supp.2d 477 (M.D. Pa. 2007), the Court concluded that 8 U.S.C. § 1324(a)(h)(2) expressly preempts any "state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" and thus the ordinance was expressly preempted. Additionally, the *Lozano* Court found the ordinance was impliedly preempted as well. Distinguishing *De Canas, supra*, which was decided before IRCA (the Immigration Reform and Control Act of 1986) was enacted, the *Lozano* Court concluded "that the ordinance as it applies *to employers* is field preempted." 496 F.Supp. at 523.

Assuming that courts in the Fourth Circuit would reach the same conclusion as in *Lozano*, it is important to note that S.1446 relates not to employers, but to illegal aliens becoming *employees*. We are unaware of any provision of the federal immigration laws addressing the issue of illegal aliens soliciting employment, as S.1446 does. Indeed, the Second Circuit has recognized that, except for a provision in federal law applying sanctions to aliens who knowingly or recklessly use false documents to obtain employment, Congress "did not otherwise prohibit undocumented aliens from seeking or maintaining employment." *Madeira v. Affordable Housing Foundation*, 469 F.3d 219, 231 (2nd Cir. 2006).

Thus, we conclude Section 2 is neither likely expressly nor impliedly preempted. See

(continued...)

As you allude in your letter, a possible question may be raised under the Fourth Amendment, the First Amendment or the Equal Protection Clause regarding the "reasonable suspicion" provision of Subsection (C) of Section 1. However, we believe such provision fully complies with the federal and state Constitutions.

The United States Constitution and the provisions thereof apply both to citizens of this country, as well as to illegal aliens. *Plyler v. Doe*, 457 U.S. 202 (1982). In our opinion, the standard employed in Subsection (C) of Section 1, i.e. that during the commission of a lawful stop, detention or arrest, a law enforcement officer, having "reasonable suspicion" that a person is an alien and is unlawfully in this country, may verify such status with federal authorities, is a constitutionally valid one. The term "reasonable suspicion," by no means, is an undefined term, but one which has been given considerable meaning in thousands of federal and state cases since *Terry v. Ohio*, 392 U.S. 1 (1968) was decided over four decades ago. In *Terry*, the United States Supreme Court held that an "investigative stop is permissible under the Fourth Amendment if supported by reasonable suspicion ...." *Ornelas v. United States*, 517 U.S. 690, 693 (1996). As the *Terry* Court emphasized, a two step analysis is required: "whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 391 U.S. at 20. The basis of the "stop" in *Terry* rested upon whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* at 21-22. "Anything less," noted *Terry*, "would invite intrusions on other more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* Reasonableness must thus be measured by an objective standard, not by

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Reinforced Earth Co. v. Workers Compensation Appeal Bd., 810 A.2d 99, 108 (Pa. 2002) ["There is no dispute that Claimant as an authorized alien cannot apply for or accept lawful employment."]. While the validity of Section 2 is a much closer question than Section 1, we cannot locate any decision which would support that this Section violates the Supremacy Clause. Certainly, it could be argued that Section 2 does not conflict with federal law, but instead reinforces it.

Madeira concluded that federal immigration law did not *clearly* preempt New York law relating to undocumented workers' recovery of compensatory damages for injuries on the job. The Court found that "[t]he mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." 469 F.3d at 241. We thus do not believe that Section 2 and the federal IRCA are so irreconcilable that the two cannot stand together. *See, Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 256 (1984). Concerns for federalism require that the benefit of doubt be given to state law. 469 F.3d at 237, citing *Younger v. Harris*, 401 U.S. 37 (1971).

the subjective impressions of the particular officer. *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979).

However, in *Ornelas, supra*, the Supreme Court also emphasized that the term "reasonable suspicion" is incapable of an absolutely precise definition. Instead, the Court emphasized that words like "reasonable suspicion" and "probable cause"

> are commonsense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." [citations omitted] ... As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." ... We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity. [citations omitted] ....] ["Reasonable suspicion" and "probable cause"] are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

517 U.S. at 695-696.

Moreover, the Court has rejected the argument that, in order to prevent pretextual traffic stops, based upon impermissible factors such as race, the Fourth Amendment requirement for such stops should not be whether probable cause existed to justify the stop," "but rather, whether a police officer, acting reasonably, would have made the stop for the reason given." *Whren v. U.S.*, 517 U.S. 806, 810 (1996). In *Whren*, the Court held that such pretextual stops, based upon race, were not the subject of the Fourth Amendment, but were instead remedied by an action under the Equal Protection Clause. In the Court's words,

> [w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depend on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Id, at 813. *See also, Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 594 (2004) ["Our cases make clear that an arresting officer's state of mind ... is irrelevant to the issue of probable cause. [H]is subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."]

In the context of illegal immigration, the existence of "reasonable suspicion," thereby permitting an officer to stop, detain or question a person for violation of the immigration laws, must be particularized, and not based upon ethnic generalizations. In *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court concluded the officer's actions to be unconstitutional. There, the Court analyzed the lack of "reasonable suspicion" as follows:

> [i]n this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who are illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

422 U.S. at 885-887.

By contrast, the Fifth Circuit, in *U.S. v. Lopez-Moreno*, 420 F.3d 420 (5th Cir. 2005), found that there was reasonable suspicion to further detain the defendant following a valid traffic stop so as to determine if defendant was transporting illegal aliens. Thus, the Court concluded that neither the Fourth Amendment nor the Equal Protection Clause was violated by the officer's continued detention of the defendant. In the view of the Fifth Circuit, the officer making the traffic stop could reasonably suspect the transportation of undocumented aliens based upon all the circumstances, and notwithstanding that the warrant check made by the officer came back "clean." According to the *Lopez-Moreno* Court,

> [i]t is clear that based on his prior experience, as soon as Officer Parker saw that the van in question – the same type of van as was involved in the earlier undocumented alien stop – was full of passengers and was being driven by a Hispanic immigrant, his suspicion was piqued. Also, the BICE agents' standing request for the Greenwood Police to call them if they had a traffic stop involving suspected undocumented aliens reflects that Officer Parker could have inferred that the prior stop in which he took art was not an isolated incident. Certainly, these considerations alone would not have provided reasonable suspicion. Any of the other factors the

> Government cites, taken on their own, also would not provide reasonable suspicion. However, when all of the factors are viewed in conjunction, we find that there was reasonable suspicion.
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> The fact that Lopez-Moreno did not know his passengers' names and was not certain whether he had eight or nine passengers was consistent with the view that Lopez-Moreno was not a commercial driver offering a completely legitimate service. Especially considering that Officer Parker already had reason to believe that vehicles full of undocumented aliens were passing through Greenwood, Lopez-Moreno's concession that the passengers might be present in the United States illegally clearly supported the inference that they were, in fact undocumented aliens. Finally, Lopez-Moreno's shrug, which Officer Parker reasonably interpreted to reflect agreement with his statement that none of the passengers were legal, provided further reason to suspect the passenger's alienage. Thus, we find that all of the factors, taken together, provided Officer Parker with an objectively reasonable basis to suspect that the passengers were undocumented aliens. For this reason, the second stop of the *Terry* test is met. Accordingly, we conclude that the district court property denied Lopez-Moreno's Fourth Amendment motion to suppress.

420 F.3d at 433-434. In addition, the Fifth Circuit found no violation of the Equal Protection Clause in the officer's detention of the defendant. The Court emphasized that "... even if we assume arguendo that the Fourteenth Amendment does provide such an exclusionary remedy, it is plain that [the Defendant-Appellant] has failed to offer proof of discriminatory purpose, a necessary predicate of an equal protection violation." *Id.* at 434.

Thus, in our opinion, the proposed legislation does not violate the Fourth Amendment or the Equal Protection Clause of the Fourteenth Amendment. The constitutional standard of "reasonable suspicion" is well recognized in authorizing a "stop" or detention under the Fourth Amendment pursuant to *Terry v. Ohio, supra* and the application of such a standard would pass muster under the Equal Protection Clause. *See, Chavez v. Ill. State Police*, 251 F.3d 612,635-636 (7th Cir. 2001) [to show a violation of the Equal Protection Clause, a claimant must prove that the actions involved had a discriminatory affect and were motivated by a discriminatory purpose]. While in a given situation, the Fourth Amendment could be raised by a defendant, or racial discrimination could be alleged with respect to a particular action by a police officer, such is no different from the present-day circumstances. Criminal defendants raise *Terry* arguments or other constitutional deprivations every day. Moreover, the proposed legislation expressly forbids racial profiling in Subsection C thereof.[2]

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[2] Subsection (C) states in pertinent part, that "[a] law enforcement officer or agency of this

(continued...)

Furthermore, we do not perceive that a court would conclude that the proposed legislation facially violates the First Amendment. A court will examine a criminal statute to insure that it is not void for vagueness, i.e. defining the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982). In such situations, involving an unconstitutionally vague law, a person may be stopped or detained at "'the whim of any police officer,'" *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) and thus there is concern based upon the "'potential for arbitrarily suppressing First Amendment liberties." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983), quoting *Shuttlesworth*, 382 U..S., *supra* at 91. The Court has thus viewed vagueness and the overbreadth doctrine [which permit a facial challenge of a law that reaches a substantial amount or conduct protected by the First Amendment] "as logically related and similar doctrines." *Kolender*, 461 U.S. 352, *supra* at n. 8, referencing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967); *NAACP V. Button*, 317 U.S. 415, 433 (1963). *See also, Chicago v. Morales*, 527 U.S. 41, 52 (1999) ["the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "'judged in relation to the statute's plainly legitimate sweep."] (plurality opinion of Stevens, J., quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973)). In *Morales*, the Court invalidated an anti-gang ordinance on vagueness grounds rather than employing the overbreadth doctrine under the First Amendment, because the ordinance did not on its face "prohibit any form of conduct that is apparently intended to convey a message, and was "[b]y its terms ... inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view." In the view of the plurality, the ordinance's "impact on the social contact between gang members and others does not impair the First Amendment "'right of association' that our cases have recognized." *Id.* at 53.

The *Kolender* decision of the United States Supreme Court is, we believe, persuasive in upholding the facial validity of S.1446 under the First Amendment. In *Kolender*, the Court struck down a California statute which required persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances which would justify a stop under *Terry v. Ohio, supra*. The Court deemed the phrase "credible and reliable" to be unconstitutionally vague and thus violative of the First Amendment's overbreadth doctrine. Noting that pursuant to the statute even a jogger not carrying identification could, depending upon the particular officer "be required to answer a series of questions concerning the route that he followed to arrive at the place where the officer detained

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State or any political subdivision of this State may not consider race, color, or national origin in implementing the requirements of this section, except to the extent permitted by the United States or South Carolina Constitution."

him ...," the Court found the unfettered discretion given the police by the statute was constitutionally indefensible under the First Amendment:

> [i]t is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat ...' and "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure.'" [citations omitted.]

461 U.S. at 360. However, the Court further concluded that the statute's use of the *Terry* standard of "reasonable suspicion" must be met before the initial stop could be made, legitimated the initial stop. In the words of the Court,

> [i]n providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979). Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Id.

Here, the proposed legislation requires an initial "lawful" stop, detention or arrest. We presume by this it is meant one which complies fully with the Fourth Amendment and other provisions of the federal and state constitutions. In order to go further once the lawful stop or detention or arrest is made, S.1446 requires there be "reasonable suspicion ... that a person stopped, detained, or arrested is an alien and unlawfully present in the United States ...." According to the Bill, "[t]he person's immigration status must be verified with the federal government pursuant to 8 U.S.C. 1373(c)." We read this as imposing the *Terry v. Ohio* standard in order for the additional detention to occur. Such a standard would likely be deemed by a court to be constitutionally valid not only under the Fourth And Fourteenth Amendments, but the First Amendment as well. *Kolender v. Lawson, supra.* There is, in our view, no unconstitutional vagueness and, even assuming that "speech" or "association" is implicated here, the First Amendment is not contravened.

Conclusion

1. Of course, if S.1446 were to be enacted, it would carry a presumption of constitutionality and will remain valid unless set aside by a court. It is our opinion that a court would likely

conclude that S.1446 is constitutional. While you indicate in your letter that S.1446 will undoubtedly be further amended, the legislation's principal provision mirrors existing constitutional standards consistent with the Fourth Amendment. S.1446 requires law enforcement to have "reasonable suspicion" that the person is an alien and is not in the country lawfully, in order to further stop or detain the person following a lawful stop. Such "reasonable suspicion" standard reflects the Fourth Amendment "search and seizure" standard long ago articulated by the Supreme Court in *Terry v. Ohio, supra.* This is no different from the constitutional requirements imposed upon INS agents who seek to detain persons to further inquire about whether they might be illegal aliens. *Marquez v. Kiley*, 436 F.Supp. 100 (S.D. N.Y. 1977). Moreover, S.1446 defers to federal immigration laws concerning who is admitted into the country and who may lawfully remain here, stating expressly that "[t]his law shall be implemented in a manner that is consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."

Further, the proposed law expressly forbids racial profiling or racial discrimination by providing that "[a] law enforcement officer ... may not consider race, color, or national origin in implementing the requirements of this section, except to the extent permitted by the United States or South Carolina Constitution."

2. In our opinion, Section 1 of S.1446 is not preempted by federal immigration laws and thus does not violate the Supremacy Clause of the United States Constitution. The essence of the legislation is to authorize state and local officers to enforce federal immigration laws criminal in nature, a function expressly recognized by federal INA laws. The proposed statute does not "regulate immigration" by involving a state determination of who should be admitted into the country or the conditions under which a legal entrant may remain. Indeed, S.1446 requires that "[t]his law shall be implemented in a manner that is consistent with federal laws regulating immigration ...." Such an enforcement function of federal immigration laws by state and local enforcement is not preempted.

3. The United States Supreme Court has recognized that "[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own illegal conduct." *Plyler v. Doe*, 457 U.S., *supra* at 219. While the Court recognizes that the children of illegal aliens fall in a special category, "those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to deportation." *Id.* Thus, we believe the Bill's provision in Section 2, making it illegal for an unauthorized or illegal alien "knowingly to apply for work, solicit work in a public place, or perform work as an employee or independent contractor," is not preempted and would be upheld as constitutional. While

there is case law which finds that state or local laws seeking to prohibit an *employer* from knowingly employing illegal aliens is both expressly and impliedly preempted, we are unaware of similar authority concerning a state's prohibition of illegal aliens soliciting employment. Again, this legislation makes no attempt to regulate immigration, but defers to federal law and immigration authorities regarding who is an illegal alien.

Moreover, the statute does not facially violate the Equal Protection Clause, in our opinion; for the State to address the many problems caused by illegal immigration is not discriminatory, but is in accord with *Plyler's* recognition that the State may withhold benefits on the basis of illegal presence in the country. See. *Plyler, id.* at 225 [states possess authority "to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal."]. We recognize that all persons who are aliens are entitled to the protection of the Constitution, and may not be discriminated against on the basis of their race. However, S.1446 is not discriminatory on its face; it simply authorizes state and local officials to enforce existing immigration laws in a manner consistent with the Constitution; and it deprives illegal aliens of the right to seek employment. In view of the proposed bill's prohibiting racial discrimination of any kind, we do not believe a Court would find the requisite discriminatory purpose to violate the Equal Protection Clause. *See, Village of Arlington Heights v. Met. Housing Devel. Corp.*, 429 U.S. 252 (1977). Further, we believe the statute reasonably mirrors federal objectives and furthers the legitimate goal of the State to withhold the benefits of employment from those who are in violation of the law.

4. In our opinion, S.1446 is also facially valid under the First Amendment. The Supreme Court decision of *Kolender v. Lawson, supra* is persuasive authority that the "reasonable suspicion" standard, employed by the legislation, insures that the decision to stop or detain an individual who, based upon the objective facts and circumstances is reasonably believed to be an illegal alien, is not left to the unfettered discretion of the police officer on the beat. As the Court held in *Kolender*, imposing of the *Terry v. Ohio* standards serve as "neutral limitations on the conduct of individual officers," thereby providing a deterrent against pretextual interference by officers with constitutionally protected liberties such as freedom of movement, free speech and association. We deem S.1446 to be neither unconstitutionally vague nor overbroad.

5. We emphasize herein that we are addressing only S.1446's facial validity. Under *Terry*, "reasonable suspicion," in a given instance, must be based upon specific objective facts, *Brown v. Texas, supra*, and cannot be based exclusively upon one's race. *U. S. v. Brignoni-Ponce, supra.* S.1446 makes that clear as well. However, *Brignoni-Ponce* also emphasizes that officers have broad discretion in deciding to make a *Terry* stop or detention to call upon

a wide range of objective factors, including "facts in light of [the officer's] experience in detecting illegal entry and smuggling." Thus, as a further safeguard, even though *Terry v. Ohio* standards are certainly implied in the legislation, we would suggest making express reference to *Terry*[3] to insure that the *Terry* standards are met.[4]

Yours very truly,

Henry McMaster

HM/an

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[3] In *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), the Supreme Court held that the State can require a suspect to disclose his name during the course of a valid *Terry* stop and that if the suspect refuses to answer, law enforcement officials can arrest him. Thus, the Nevada "stop and identify" statute was upheld as constitutional under the Fourth and Fifth Amendment. The Court noted that the request for the suspect's identity possesses "an immediate relation to the purpose, rationale and practical demands of a *Terry* stop," and is a"commonsense inquiry" rather than a violation of the Fourth and Fifth Amendment.

[4] Again, our opinion herein addresses only the constitutional issues involved with the Bill as written and we assume further amendments, as you indicate. To reiterate, we read the "reasonable suspicion" standard relating to illegal alien status as only being triggered following a lawful stop, detention or arrest. If this reading is not accurate, the Legislature may wish to clarify it.